Filed 6/22/09 In re B.E. CA2/8

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re B.E., a Person Coming Under the Juvenile Court Law.	B210476 (Los Angeles County Super. Ct. No. CK66733)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. K.W., Defendant and Appellant.	

APPEAL from an order of the Superior Court for the County of Los Angeles. Marilyn Martinez, Referee. Affirmed.

Linda Rehm, under appointment by the Court of Appeal, for Defendant and Appellant.

Raymond G. Fortner, Jr., County Counsel, James M. Owens, Assistant County Counsel, and Denise M. Hippach, Senior Associate County Counsel, for Plaintiff and Respondent.

SUMMARY

The juvenile court in this dependency case terminated the mother's reunification services. Several months later, the mother filed a Welfare and Institutions Code section 388 petition seeking the return of her three-year old daughter or further reunification services and unmonitored visitation.[1] She asserted circumstances had changed, as she was participating in a substance abuse program and continuing to test negative, and her daughter wanted to be with her. The juvenile court denied the petition without a hearing, concluding the mother was just beginning to address her long history of substance abuse, and the relief requested would not be in her daughter's best interests. We affirm the juvenile court's order.

FACTUAL AND PROCEDURAL BACKGROUND

B.E. was detained on January 24, 2007, when she was 22 months old. Her mother, K.W., who had a history of marijuana use, had engaged in an altercation with another woman while holding B.E. in her arms, and was arrested for vandalizing the woman's vehicle. Paternal relatives told police the mother was under the influence of drugs and out of control during the incident.

While the mother visited B.E. regularly, she failed to reunify with her daughter. During the 15 months after B.E. was detained, the mother continued to use drugs. While she tested negative eight times, she also had five "no-show" drug tests, and five positive tests; she tested positive for marijuana four times, in October and December 2007, and tested positive for cocaine in January 2008. The mother completed individual counseling and parenting classes, and apparently completed an anger management class in May 2007.[2] In any event, the mother continued to have anger problems, and had conflicts with

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[1] All statutory references are to the Welfare and Institutions Code.

[2] The mother presented the social worker with a "notification of completion" of an anger management class signed by a counselor, dated May 4, 2007. However, the notice stated the program was begun and completed on the same day, and when the Department called the counselor to verify the mother's participation, the counselor informed the Department he conducted only domestic violence classes, not anger management classes.

B.E.'s caretakers. The minor's counsel obtained a temporary restraining order against her on April 16, 2008, in favor of B.E.'s third caregiver (and later prospective adoptive parent), T.H. (T.H. ultimately did not pursue a permanent restraining order, stating that B.E. would be removed from her home if she did.) The mother was also arrested twice during the reunification period, once in connection with an incident in which a friend stole curtains from a store, and again in April 2008, when a friend passed a fictitious check.

On April 24, 2008, reunification services were terminated. The court (Judge Spear) found the mother was in partial compliance with her case plan, but that she had not resolved her drug use issues. (The mother had enrolled in a drug rehabilitation program in March 2008, but was then incarcerated for being an accessory in the fictitious check incident, and was in custody at the time of the hearing.) The court observed that:

> "[S]he's basically relapsed. That's not going to go away. And it's not going to go away in three months, so because of that, the court cannot find a substantial likelihood that the child can be returned to mother by the 18-month date. She needs to get into that treatment program. [¶] I think a lot of her anger management control issues were drug related. . . . [¶] Mother was doing really well. Court had liberalized mother's visitation. [¶] I think she has a good likelihood of having the child returned to her as she proves her sobriety . . . . [¶]. . . [¶] I'll look forward to getting a 388 petition from mother when she gets out of custody and into a program. And mother's visits should be monitored . . . at a D.C.F.S. office."

A few months later, on August 6, 2008, the mother filed a section 388 petition, seeking B.E.'s return, or her return with family maintenance services, or further reunification services and liberalized visitation. She alleged she had "enrolled in an additional program at Sheltering Arms on March 3, 2008, which she attends 23 hours per

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The counselor said he would verify the mother's participation and notify the Department, but never did so, and the Department was concerned about the authenticity of the letter. At the twelve-month review hearing, however, the Department stated mother had completed anger management classes.

week, and is making satisfactory progress," and that she was drug testing negative weekly since her positive test in January 2008. Her declaration explained that she now understood that "I have a drug problem and an anger management problem." She stated she understood she had sabotaged herself by using cocaine and marijuana, that drugs had messed up her life, and also that she had a problem with anger and was "continuing to work on releasing that anger in counseling," and "control[led] it better now . . . ." She also explained that she visited her daughter as much as was permitted (monitored visits three times a week for two hours at a time), and that B.E. loved her and wanted to be with her.

After argument, the juvenile court (Referee Martinez) denied the petition without a hearing, observing that "[t]he facts do not support what is requested," and "I do not find it is in the child's best interest." The court noted that the mother "is just beginning to address her long history of substance abuse," and "[h]as not begun to address her anger management issues." The court said:

> "What's important here is that just a few months ago the court found by the preponderance of the evidence that it will be detrimental to return this child to the parent. . . . [¶]. . . [¶] [Mother] finally has apparently taken stock and acknowledges that she had a relapse, that she continues to be drug involved and that she needs to learn how to stop using drugs. She admits that she continues to have an anger problem. She enrolled in her drug treatment program almost exactly four weeks ago. . . . [¶] This child has a right to permanency and stability. [Mother] had her opportunity to comply to change her lifestyle. She did not do it within the requisite statutory amount of time. [¶] [Mother], I commend you for recently enrolling in a program; for coming to court and telling me that you now understand that you have a drug problem. [¶] [Mother] is at the very beginning stages of addressing her drug problem. She has not verified sufficient progress to cause me to find that she is very close to verifying that she can live and sustain a drug-free lifestyle and also manage her anger. And, therefore, it is not in this child's best interest to reinstate family reunification when this child is so close to receiving permanency and stability. [¶] I do not need [the mother] to testify under oath so that I can assess her credibility and her sincerity. Her declaration is quite remarkable and I take it to be sincerely written. I suspect she perhaps had assistance from her attorney. Nonetheless, she

> comes to court today acknowledging that she has a drug problem and she now is going to do something about it."

The mother filed a timely appeal from the juvenile court's order denying her section 388 petition.

DISCUSSION

As our Supreme Court has explained, the dependency scheme generally entitles a parent to 12 months of reunification services (with a possibility of an additional six months), and during this period there is a statutory presumption that the child will be returned to parental custody. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 308.) But if the child may not be safely returned to the parent within the allotted period – as in this case – the court must develop a permanent plan for the child. (*Ibid.*) Once reunification services are terminated, "the focus shifts to the needs of the child for permanency and stability," and "the child's interest in permanency and stability takes priority." (*Id.* at p. 309.) "The burden thereafter is on the parent to prove changed circumstances pursuant to section 388 to revive the reunification issue." (*Ibid.*)

Section 388 permits a parent, upon grounds of change of circumstance or new evidence, to petition the court for a hearing to change or set aside a previous order. (§ 388, subd. (a).) The court must order a hearing if it appears that the best interests of the child may be promoted by the proposed change.[3] (§ 388, subd. (d).) The petition is "to be liberally construed in favor of granting a hearing to consider the parent's request." (*In re Marilyn H., supra*, 5 Cal.4th at p. 309.) The parent "need only make a prima facie showing to trigger the right to proceed by way of a full hearing." (*Id.* at p. 310.) However, "[i]t is not enough for a parent to show *just* a genuine change of circumstances

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[3] Section 388 provides that "[a]ny parent . . . may, upon grounds of change of circumstance or new evidence, petition the court . . . for a hearing to change, modify, or set aside any order of court previously made . . . ." (§ 388, subd. (a).) It further provides that "[i]f it appears that the best interests of the child may be promoted by the proposed change of order . . . , the court shall order that a hearing be held . . . ." (§ 388, subd. (d).)

under the statute. The parent must show that the undoing of the prior order would be in the best interests of the child." (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 529.)

The mother argues the trial court abused its discretion in summarily denying her section 388 petition without a hearing. (*In re Angel B.* (2002) 97 Cal.App.4th 454, 460 [summary denial of section 388 petition is reviewed for abuse of discretion].) She argues her petition presented sufficient evidence of a change in circumstances – and sufficient evidence that a change in the court's order would be in B.E.'s best interests – to justify a hearing. We disagree.

First, the mother's evidence may have shown that circumstances were changing, but it was insufficient to show actual change. (See *In re Kimberly F., supra*, 56 Cal.App.4th at p. 531, fn. 9 [noting its doubt that "the parent who loses custody of a child because of the consumption of illegal drugs and whose compliance with a reunification plan is incomplete during the reunification period" could ever show a sufficient change of circumstances to warrant granting a section 388 motion; "[i]t is in the nature of addiction that one must be 'clean' for a much longer period than 120 days to show real reform"]; see also *In re Casey D.* (1999) 70 Cal.App.4th 38, 47 ["[a] petition which alleges merely changing circumstances and would mean delaying the selection of a permanent home for a child to see if a parent, who has repeatedly failed to reunify with the child, might be able to reunify at some future point, does not promote stability for the child or the child's best interests"].) Here, less than four months had elapsed since the juvenile court terminated reunification services, and the mother had been in her new drug program for only a month. We cannot disagree with the juvenile court's conclusion that the mother was "at the very beginning stages of addressing her drug problem," and therefore did not demonstrate changed circumstances.[4]

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[4] Cases finding the juvenile court abused its discretion in denying a section 388 hearing present a stark contrast with this case, because the evidence presented in those cases showed that the problem which precipitated the child's dependency was resolved or eliminated. Thus:

Second, and even more importantly, the statute expressly requires the court to order a hearing only "[i]f it appears that the best interests of the child may be promoted by the proposed change of order . . . ." (§ 388, subd. (d).) As stated in *In re Zachary G.* (1999) 77 Cal.App.4th 799, the court need not order a hearing if the petition does not make a prima facie showing – in addition to changed circumstances – that the proposed change would promote the best interests of the child. (*Id.* at pp. 806, 808 ["Mother's allegations did not show, and there was no independent evidence from Mother's therapist or expert showing, that it was in Zachary's best interests" to be removed from the only home he had ever known].) Here, the only showing the mother made was her own testimony to the effect that there was a bond between the mother and B.E. and that B.E.

- In *In re Hashem H.* (1996) 45 Cal.App.4th 1791, the mother lost custody of her son because of psychological problems. She sought to regain custody in a section 388 petition, alleging she regularly participated in psychotherapy; her progress in therapy led her therapist to opine (in a letter attached to the petition) that her son should be returned to her custody; she held a job; and she was ready and able to provide for the child. The juvenile court denied her petition without a hearing, because the mother did not allege the successful completion of therapy. The court of appeal concluded the prima facie showing of changed circumstances had been made, and it was error to deny a hearing when there was evidence that the problems which had led to removal of the child had been successfully resolved. (*Id.* at pp. 1796-1799.) (There was no contention that return of the child to the mother was not in the best interests of the child.)

- *In re Jeremy W.* (1992) 3 Cal.App.4th 1407 is to the same effect. The court found it was error to deny the mother a hearing on her section 388 motion, where the mother submitted evidence – declarations from herself, the child's grandmother, and a clinical psychologist – that she had cured the only remaining issue (lack of stable housing) that had prevented earlier reunification. The record also showed a strong bond between mother and child, including a bonding study in which the evaluator believed there would be a significant risk of harm to the child if he were permanently separated from the mother. (*Id.* at pp. 1413, 1415-1416; cf. *In re Kimberly F., supra*, 56 Cal.App.4th at p. 535 [juvenile court abused its discretion in denying mother's section 388 motion (after a hearing) where the only legitimate reason for not returning her children to her at the 18-month review hearing was unsanitary conditions in the household, and the unsanitary conditions had been eliminated by the time of the section 388 hearing].)

loved her and wanted to be with her. But, even if this testimony were credited at a hearing, it would not establish that a change in the court's order would be in B.E.'s best interests. As *In re Kimberly F.* teaches, the strength of a parent's bond with the child is an important factor in determining the best interests of the child in the context of a section 388 petition, but "the strength of a child's bond to his or her present caretakers" is also a vital consideration – and here it is one which the mother's petition does not address. (See *In re Kimberly F., supra*, 56 Cal.App.4th at pp. 531, 532 ["the strength of relative bonds between the dependent children to *both* parent and caretakers" is one of the factors upon which to evaluate a section 388 petition].)[5] Here, B.E. appeared to be "happy, content, comfortable, and stable" in T.H.'s home, and B.E. "appear[ed] to be bonded with [T.H.] and her children," with whom B.E. had been living for eight months at the time of the petition.[6] The mother, whose visits with B.E. remained monitored, made no prima facie showing of the strength of her own bond with B.E., much less as compared to B.E.'s bond with her caretaker. Under these circumstances, we cannot say the juvenile court abused its discretion in concluding the mother did not make the necessary prima facie showing that a change in the court's order would promote B.E.'s best interests.

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[5] *In re Kimberly F.* summarized the factors which, "[w]hile … not meant to be exhaustive," provide "a reasoned and principled basis on which to evaluate a section 388 motion" as follows: "(1) the seriousness of the problem which led to the dependency, and the reason for any continuation of that problem; (2) the strength of relative bonds between the dependent children to *both* parent and caretakers; and (3) the degree to which the problem may be easily removed or ameliorated, and the degree to which it actually has been." (*In re Kimberly F., supra,* 56 Cal.App.4th at p. 532.) In this case, as mother concedes, "a history of substance abuse is fairly serious . . . ." And as to the third factor, the mother points only to the "great strides" she has made in testing clean since her services were terminated and in showing her awareness of her problem.

[6] While the Department's March 2008 report showed that the mother "interacts very well with [B.E.] and [B.E.] is comfortable in the presence of mother," a June 12, 2008 report observed that B.E. "looks forward to returning to [T.H.]," and "[o]ften she will ask 'When is [T.H.] coming.'"

DISPOSITION

The order is affirmed.

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BAUER, J.[*]

We concur:

RUBIN, Acting P.J.

BIGELOW, J.

[*] Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.